

ELECTRONIC FRONTIER FOUNDATION,)	Civil Action No. 3:07-cv-05278 SI
)	
Plaintiff,)	JOINT CASE MANAGEMENT
)	STATEMENT
v.)	
)	Judge: Hon. Susan Illston
OFFICE OF THE DIRECTOR OF NATIONAL)	Date: January 25, 2008
INTELLIGENCE,)	Time: 2:00 p.m.
)	Place: Courtroom 10, 19th Floor
Defendant.)	
)	
)	
)	

1. Jurisdiction and Related Issues

2. Facts

In two letters sent by facsimile to ODNI and dated August 31, 2007, EFF requested under the Freedom of Information Act all records from April 2007 to August 31, 2007 concerning briefings, discussions, or other exchanges that ODNI Director Michael McConnell or other ODNI officials have had concerning amendments to the Foreign Intelligence Surveillance Act ("FISA") with a.) representatives of telecommunications companies, and b.) members of the Senate or House of

1 Representatives, including any discussion of immunizing telecommunications companies or
2 holding them otherwise unaccountable for their role in government surveillance activities. EFF
3 also formally requested that the processing of these requests be expedited because they pertain to
4 information about which there is “[a]n urgency to inform the public about an actual or alleged
5 federal government activity,” and were “made by a person primarily engaged in disseminating
6 information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 1700.12(c)(2). By two facsimiles sent
7 September 10, 2007, ODNI acknowledged receipt of EFF’s FOIA requests, and informed EFF that
8 its requests for expedited processing had been granted. ODNI did not complete processing of
9 EFF’s requests within the twenty-working-day timeframe set forth by the FOIA.
10

11 EFF filed this action on October 17, 2007, seeking the expedited processing and release of the
12 requested documents. On October 29, 2007, EFF filed a motion for a preliminary injunction to
13 compel the timely processing and production of the records. On November 27, 2007, this Court
14 granted in part and denied in part EFF’s motion for a preliminary injunction, ordering ODNI to
15 “respond to plaintiff’s FOIA request and provide an interim release no later than November 30,
16 2007.” The Court also ordered the agency to “provide a final release of all responsive, non-exempt
17 documents no later than December 10, 2007,” as well as an “affidavit with its final response setting
18 forth the basis for withholding any responsive documents it does not release.”
19

20 On November 30, 2007, ODNI released to EFF a total of 242 pages, 230 of which were
21 disclosed in full, and twelve withheld in part pursuant to 5 U.S.C. § 552(b)(2). ODNI provided its
22 second disclosure to EFF on December 10, 2007, as well as the affidavit required by the Court
23 discussing the basis for the agency’s withholdings (hereafter “Hackett Declaration”). In ODNI’s
24 December 10 release, the agency disclosed 238 pages in full; withheld twenty-nine pages in part
25 pursuant to 5 U.S.C. §§ 552(b)(1), (2) & (3); and withheld fourteen pages in full pursuant to 5
26
27
28

1 U.S.C. §§ 552(b)(1), (2), (5) & (6), and because ODNI determined that two of the pages were not
2 agency records for purposes of the FOIA.

3 **3. Legal Issues**

4 The parties have agreed to narrow the legal issues remaining to be litigated. Specifically, EFF
5 has decided not to challenge ODNI's withholding claims *except* for those described in ¶¶ 10 & 12
6 of the Hackett Declaration. These withholdings are 1.) eleven pages of briefing materials withheld
7 in full under 5 U.S.C. §§ 552(b)(1) & (3); and 2.) a telephone message slip withheld in full under 5
8 U.S.C. §§ 552(b)(1), (3), (5) & (6), and because ODNI contends that it is not an agency record.

9 **4. Motions**

10 EFF filed a motion for a preliminary injunction on October 29, 2007, seeking to compel the
11 timely processing and production of the records at issue in this case, which the Court granted in
12 part and denied in part on November 27, 2007.

13 The parties anticipate that dispositive briefing will resolve this case at a summary stage. EFF
14 reserves the right to seek discovery under Fed. R. Civ. P. 56(f) after ODNI files its motion for
15 summary judgment and supporting declarations or indices pursuant to *Vaughn v. Rosen*, 484 F.2d
16 820, 826-8 (D.C. Cir. 1973). EFF also intends to move for attorneys fees if it is unable to reach an
17 agreement with ODNI on this issue after the Court rules on the parties' dispositive motions.

18 **5. Amendment of Pleadings**

19 Neither party anticipates amending its pleadings to add or dismiss claims or defenses.

20 **6. Evidence Preservation**

21 Counsel have discussed evidence preservation and have explained this obligation to the parties.
22 ODNI is taking all reasonable steps to preserve documents responsive to EFF's FOIA requests that
23 were located during the course of ODNI's search process, including those documents withheld
24 from EFF.
25
26
27
28

1 **7. Disclosures**

2 The parties agree that initial disclosures are not necessary in this case, as this is an action for
3 review on an administrative record and is therefore exempt from initial disclosure requirements
4 under Fed. R. Civ. P. 26(a)(1)(E)(i).

5 **8. Discovery**

6 To date, no discovery has been taken by any party. The parties do not anticipate proposing any
7 limitations or modifications of the discovery rules. As mentioned *supra*, EFF reserves the right to
8 seek discovery pursuant Fed. R. Civ. P. 56(f) after ODNI files its motion for summary judgment
9 and accompanying papers.
10

11 **9. Class Actions**

12 This case is not a class action.

13 **10. Related Cases**

14 There are no related cases pending before this Court as defined by Local Rule 3-12. The parties
15 note, however, that EFF filed a lawsuit against the Department of Justice on September 27, 2007 in
16 United States District Court for the District of Columbia seeking the expedited release of records
17 substantially similar to the documents in this case. *Electronic Frontier Foundation v. Department*
18 *of Justice*, No. 1:07-cv-01732-RBW (D.D.C. filed Sept. 27, 2007). That case is still pending.
19

20 **11. Relief**

21 EFF seeks injunctive relief with respect to the release and disclosure of all records responsive
22 to its August 31, 2007 FOIA requests. EFF also seeks expeditious proceedings in this action, as
23 well as costs and reasonable attorneys fees incurred in this litigation. ODNI seeks dismissal of this
24 action and the assessment of costs.
25

26 **12. Settlement and ADR**

27 The parties believe that the prospect of settlement is low at this time. This case has been
28

1 assigned to the ADR Multi-Option Program, and the parties have conferred about ADR processes
2 in conformance with ADR Local Rule 3-5. The parties believe that this case is not well suited to
3 ADR resolution, and therefore have filed a Notice of Need for ADR Phone Conference pursuant to
4 ADR Local Rule 3-5(c)(2).

5
6 **13. Consent to Magistrate for All Purposes**

7 On October 29, 2007, EFF filed its consent to proceed before a magistrate judge. On October
8 30, 2007, ODNI declined to proceed before a magistrate judge, and so does not consent to have a
9 magistrate judge conduct all further proceedings including trial and entry of judgment.

10 **14. Other References**

11 The parties agree that this case is not suitable for reference to binding arbitration or a special
12 master, or reference to the Judicial Panel on Multidistrict Litigation.

13
14 **15. Narrowing of Issues**

15 The parties have agreed to significantly narrow the legal issues remaining in this case, as
16 described *supra*. No party requests bifurcation of any issues, claims, or defenses.

17 **16. Expedited Schedule**

18 Because time is at the essence of both EFF's rights and ODNI's obligations, EFF believes that
19 this case should be handled on an expedited basis with streamlined procedures. The parties
20 anticipate that this case will be resolved by the Court on summary judgment and the parties have
21 agreed to the following briefing schedule:
22

- 23 * February 5, 2008 – ODNI Motion For Summary Judgment
- 24 * February 15, 2008 – EFF Opposition To Motion For Summary Judgment
- 25 * February 22, 2008 – ODNI Reply In Support of Motion For Summary Judgment
- 26 * March 7, 2008 – Motion Hearing Date

27 The parties agree to reserve their rights to seek extension of these deadlines as circumstances
28

1 warrant. A proposed order is attached as Exhibit 1.

2 **17. Scheduling**

3 See paragraph 16 above.

4 **18. Trial**

5 The parties anticipate that this entire case will be resolved by the Court on summary judgment,
6 and do not anticipate that this case will be decided a jury.
7

8 **19. Disclosure of Non-Party Interested Entities or Persons**

9 EFF has filed a Certification of Interested Entities or Persons as required by Local Rule 3-16
10 stating that, aside from the named parties, there is no interest to report. ODNI has not filed a
11 Certification of Interested Entities or Persons because Local Rule 3-16 excuses government entities
12 or their agencies from this requirement.
13

14 **20. Other Matters As May Facilitate the Just, Speedy and Inexpensive Disposition of
This Matter**

15 ODNI hereby provides notice to the Court that because this FOIA case involves litigation
16 concerning release of classified information, resolution of this case may require the submission of
17 classified information (*ex parte* and *in camera*) to the Court.
18
19
20
21
22
23
24
25
26
27
28

1 DATED: January 16, 2008

Respectfully submitted,

2
3 David L. Sobel, Esq. (*pro hac vice*)
4 ELECTRONIC FRONTIER FOUNDATION
5 1875 Connecticut Ave. NW
6 Suite 650
7 Washington, DC 20009
Telephone: (202) 797-9009 x104
Facsimile: (202) 797-9066

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

SCOTT N. SCHOOLS
United States Attorney

8 /s/ Marcia Hofmann
9 Kurt Opsahl, Esq.
10 Marcia Hofmann, Esq.
11 ELECTRONIC FRONTIER FOUNDATION
12 454 Shotwell Street
13 San Francisco, CA 94110
14 Telephone: (415) 436-9333
15 Facsimile: (415) 436-9993

ELIZABETH J. SHAPIRO
Assistant Director, Federal Programs Branch

16
17
18
19
20
21
22
23
24
25
26
27
28
Attorneys for Plaintiff
ELECTRONIC FRONTIER FOUNDATION

/s/ Andrew I. Warden
ANDREW I. WARDEN (IN Bar No. 23840-49)
Trial Attorney, U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 6120
Washington, D.C. 20530
Telephone: (202) 616-5084
Facsimile: (202) 616-8460
E-mail: Andrew.Warden@usdoj.gov

*Attorneys for Defendant Office of the
Director of National Intelligence*